FILE COPY

Office - Supreme Court, U.S.
FILED
JAN 14 1947
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 887

□

GERALD DAVID HUDSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari
to the United States Circuit Court of Appeals
for the Tenth Circuit

HAYDEN C. COVINGTON
Counsel for Petitioner

INDEX

Cases Cited

PAGE

Cahoon v. United States
152 F. 2d 752 (CCA-5), cert. denied 67 S. Ct. 57, pending on petition for rehearing, No. 183 Oct. Term 1946:
Petition for writ of certiorari, pp. 29-31 8
Petitioner's reply to brief in opposition, pp. 2-5 8

Dodez v. United States
— U. S. —, No. 86 Oct. Term 1946, decided Dec. 23, 1946 7

Estep v. United States
327 U. S. 114 ..... 2, 4, 6, 7

Falbo v. United States
320 U. S. 549 ..... 2, 4, 6, 7

United States v. Balogh
— F. 2d — (CCA-2) decided Oct. 31, 1946, pending on petition for writ of certiorari, No. 800 Oct. Term 1946:
Government's petition for writ of certiorari, pp. 12-18 8
Respondent's memorandum in opposition, pp. 1-7 8

Statutes and Regulations Cited

Judicial Code, sec. 240 (a) as amended by Act of Feb. 13, 1925 1

Regulations, Selective Service (32 C. F. R. 601.5 et seq.)
secs. 622.44, 623.1, 623.2, 627.24, 629 2

Rules of Criminal Appeals, Rules XI and XIII (May 7, 1934) 1

State Director Advice 213-B, National Headquarters, Selective Service System 5

United States Code, Title 50, App. secs. 301-318
["Selective Training and Service Act of 1940" as amended, secs. 3 (a), 5 (d), 10 (a) and 11] 2, 3
Secs. 303, 304 (a) [57 Stat. 596, 599, amendment of Dec. 5, 1943] 6, 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No.

□

GERALD DAVID HUDSON, *Petitioner*
v.
UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Gerald David Hudson, petitions this court for a writ of certiorari. He shows unto the court as follows:

1. *Opinion of the court below.*

The opinion of the United States Circuit Court of Appeals is reported at 157 F. 2d 782. It appears in the record, [83-85]*

2. *Jurisdiction.*

The Jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court on May 7, 1934.

* Bracketed figures appearing in this petition refer to pages of printed transcript of record.

3. *Timeliness of this petition.*

The judgment of affirmance was rendered and entered October 22, 1946. [85-86] Time to file a petition for rehearing was enlarged to November 9, 1946. [86] The petition for rehearing was filed November 6, 1946. [94] The petition was denied November 20, 1946. [95] Upon application duly made the time for filing petition for writ of certiorari was enlarged to and including January 18, 1946. The petition for writ of certiorari is filed within the enlarged time.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. 301-318) are drawn in question here, as well as Sections 622.44, 623.1, 623.2, 627.24 and 629 of the Selective Service Regulations (32 C. F. R. 601.5 *et seq.*) promulgated by the President under said Act.

5. *Questions presented.*

The principal question presented is whether a minister of religion, classified as liable for training and service in the armed forces, who refuses to report for induction, after having his acceptability determined upon a preinduction physical examination, is entitled to challenge the order to report for induction in defense against a criminal prosecution under the Act, based on his refusal to report. In other words, did the courts below err in holding, as a matter of law, that petitioner could not challenge the draft board order because he had not reported for induction?

That is to say, did the courts below commit fundamental error in holding that the decision of *Falbo* v. *United States* (320 U. S. 549), rather than that of *Estep* v. *United States* (327 U. S. 114) applied?

Did the courts below err in holding, as a matter of law, that the determination of the administrative agency on

whether petitioner was exempt from training and service as a minister of religion, was not a matter for the determination of the court or jury in defense to the indictment charging petitioner with defiance of the order to report for induction?

The following subsidiary question arises only if the principal question is answered in the negative: Did the issuance of the order to report for induction more than ninety days after preinduction physical examination, which was contrary to the Regulations, make the order null and void so as to excuse petitioner from reporting as ordered?

Statement of Case

Form of Action

This criminal action was instituted in the District Court of the United States for the District of Kansas, Third Division, by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [1-2]

The indictment charged that petitioner, a registrant classified for training and service in the armed forces, "did then and there unlawfully, willfully, knowingly, and feloniously fail and neglect to report to said Local Board at the time and place so designated in said order." [2]

Thereafter petitioner pleaded "not guilty". [4] The trial to a jury before the court was waived. [5, 9] The Government presented its case to the court and rested, whereupon petitioner moved for an instructed verdict. [17-21] At the close of all the evidence, petitioner moved for a judgment of acquittal and again his motion was denied, with exception to him. [39-40] The court rendered its verdict of guilty on March 12, 1946. [40] Judgment was promptly pronounced thereon. [9]

Petitioner moved for a new trial, but his motion was overruled, with exception. [10-11]

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. [12-14]

After the case was lodged in the United States Court of Appeals, the cause was duly submitted on September 9, 1946. [43] On October 22, 1946, the court held that the judgment should be affirmed upon the authority of *Falbo* v. *United States,* 320 U. S. 549, and that *Estep* v. *United States,* 327 U. S. 114, did not apply. [83-85] The judgment of affirmance was duly entered. [85-86]

Facts

Hudson, now 21 years of age, registered under the Selective Training and Service Act of 1940, on September 16, 1943, with Crawford County Local Board No. 1, at Girard, Kansas. [17-18] He was thereupon assigned order number 11607 by said board. [53] He timely filed a Selective Service Questionnaire on October 11, 1943, answering all the questions required of him. [55-82] In Series VIII he stated that he was a minister of religion, did customarily serve as a minister and had been a minister of Jehovah's witnesses since August 16, 1942. [65] In the questionnaire he claimed classification of IV-D exempting him as a minister of religion under Section 5 (d) of the Act. [67] Supporting his claim he filed with the board written proof as to his ministerial work. [79-81]

Also filed by Hudson was a Special Form for Conscientious Objector, properly filled out, which contained additional evidence as to his training for the ministry and activity as a minister. [44-54]

A number of persons testified as to ministerial status of petitioner. [21-31] His mother testified that she had raised her son up in the nurture and admonition of the Lord to be a minister. [23-25] Lola Harris and Victor Scovell said that they recognized him as a minister because of his service and relationship to the congregation. [26-29]

There was no evidence in his file disputing the evidence and claim that he was a duly recognized minister of religion, representing a religious organization known as Jehovah's witnesses and, as its legal governing body, the Watchtower Bible and Tract Society. There was no evidence that petitioner did not fit, as a minister of religion, State Director Advice No. 213-B of National Headquarters of Selective Service System concerning the ministerial status of Jehovah's witnesses [44-82]; that he did not stand in relation to Jehovah's witnesses in the same way that the recognized orthodox clergy stand toward their congregations; that he did not perform ceremonies that are ordinarily performed by ministers of religion under the Act. This was freely admitted by the draft board officials who had handled his case. [44-82]

He was deferred because of his agricultural pursuits. [18-69] Finally the deferment was withdrawn and he was placed in Class I-A, making him liable for training and service in the armed forces, on April 4, 1945. [18, 69] On April 6, 1945, he appealed. [18] On June 8, 1945, the board of appeal denied his claim for exemption as a minister, as had the local board, and affirmed his I-A classification. [18, 69] He was duly notified by mail on June 19, 1945.

Having been previously ordered to report for preinduction physical examination and having been found physically fit for training and service [18, 69-71] he was, on July 19, 1945, ordered to report at his local board to proceed for induction on August 6, 1945. [18, 43-44, 71] Petitioner failed to report for induction as ordered. [18, 37]

How Issues Raised

At the close of all the evidence petitioner made a formal motion for judgment of acquittal. [39] At the close of all the evidence the court found petitioner guilty. [39-40] The court held that there was nothing "in this case that brings it within the rule announced in the Estep case, which is the decision of the Supreme Court". [40]

Petitioner duly filed his motion for new trial on March 13, 1946, requesting that the judgment rendered on March 12, 1946, be set aside and a new trial ordered. [10-11] Two of the grounds of the motion were that the court erred in holding that the decision in the case of *Falbo* v. *United States, supra,* applied, rather than the decision in the case of *Estep* v. *United States, supra.* [10-11] The motion for new trial was overruled, with exception to petitioner. [12]

The court below, in its opinion affirming the judgment of the trial court, held that petitioner had failed to exhaust his administrative remedies and that, accordingly, the contention of petitioner that the *Estep* decision applied should be overruled and the judgment in the case affirmed under the doctrine of the *Falbo* case. [83-85]

In his petition for rehearing, petitioner renewed his contention that he was not precluded by the *Falbo* decision from challenging the draft board order because he had exhausted his administrative remedies inasmuch as he had been accepted upon a preinduction physical examination pursuant to the amendment of the Selective Training and Service Act of 1940 by Act of Congress on December 5, 1943, 50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599. [89-94] Petition for rehearing was overruled. [95]

Specifications of Error

The Circuit Court of Appeals for the Tenth Circuit erred—

(1) in affirming the judgment of conviction;

(2) in failing to order the judgment reversed and the indictment dismissed; and

(3) in failing to reverse the judgment and order a new trial.

Reasons Relied on For Granting the Writ

The holding of the court below is in direct conflict with the holding of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Balogh*, decided October 31, 1946, now pending upon petition for writ of certiorari in No. 800, October Term 1946. Moreover the holding of the court below is in direct conflict with the holding of this court on December 23, 1946, in *Dodez* v. *United States*, No. 86, October Term 1946.

In event the court holds that there is no conflict as above asserted, then petitioner says that there is presented upon this petition an important question of federal law which has not been, but which should be, settled by this court. That is, does the amendment of the Selective Training and Service Act of 1940, on December 5, 1943, and the promulgation of the regulation thereafter requiring a preinduction physical examination, entitle petitioner in this case to contend that he exhausted his administrative remedies upon the acceptance for training and service at his preinduction physical examination, and that the rule announced in *Estep* v. *United States*, No. 292 October Term 1945, and in *Dodez* v. *United States*, No. 86 October Term 1946, applies rather than the rule in *Falbo* v. *United States*, No. 73 October Term 1943?

The reasons relied on for granting the writ in this case have been exhaustively dealt with by counsel for peti-

tioner in *Cahoon* v. *United States,* No. 183 October Term 1946 (certiorari denied 67 S. Ct. 57), now pending on petition for rehearing. See the petition for writ of certiorari, pages 29-31; also petitioner's reply to the brief in opposition, pages 2-5.

Moreover counsel for petitioner and the Solicitor General have written upon this matter quite extensively in the papers filed in *United States* v. *Balogh,* No. 800 October Term 1946. See the Solicitor General's petition for writ of certiorari, pages 12-18, and respondent's memorandum in opposition, pages 1-7.

WHEREFORE, your petitioner prays that this court issue a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit directing such court to certify to this court for review and determination on a day certain to be therein specified, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and petitioner further prays that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court, be here set aside and petitioner dismissed from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial consistent with this court's opinion; and that your petitioner be granted such other and further relief in the premises as to this court may seem just and proper in the circumstances.

GERALD DAVID HUDSON, *Petitioner*

By HAYDEN C. COVINGTON

Counsel for Petitioner

INDEX

CITATIONS

Cases:	Page
Estep v. *United States*, 327 U. S. 114	2
Falbo v. *United States*, 320 U. S. 549	3
United States v. *Balogh*, 156 F. 2d 939, judgment vacated, No. 800, this Term, decided January 20, 1947	3
Statute:	
Section 11 of the Selective Training and Service Act of 1940	1

729059—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 887

GERALD DAVID HUDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 31, 1945, petitioner was indicted (R. 1–2) in the United States District Court for the District of Kansas in one count charging that he wilfully failed to report for induction on August 6, 1945, as ordered by his local board, in violation of Section 11 of the Selective Training and Service Act of 1940. At petitioner's trial before the court, a jury having been waived (R. 5, 9), it was undisputed that petitioner was finally classified I–A by his board of appeal, that he was ordered to report for induction on August 6, 1945, and that he refused to report, thereby foreclosing a final determination as to his acceptability by the Army at the induction station

(R. 18, 37). For his defense, petitioner contended that he should have been exempted from military service as a minister of religion and in support of this defense he was permitted to place in evidence the material contents of his selective service file (R. 21) and to adduce, in addition, *de novo* evidence bearing on his asserted ministerial status (R. 22–39).

The trial court reviewed petitioner's selective service classification and concluded: "After reviewing all the files, everything that has been offered in evidence I think I concur with the views of the draft board, he is not a minister of religion under the terms used in the Act and, therefore, is not exempt. * * * If this young man is a minister then every officer in organized religious work is a minister, members of the board of deacons, board of stewards, so I cannot disagree with the findings of the draft board" (R. 39–40). Accordingly, petitioner was convicted and sentenced to imprisonment for three years (R. 9–10). Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgment of the district court was affirmed (R. 85). The circuit court of appeals held that petitioner had failed to exhaust his administrative remedies and that the decision in *Estep* v. *United States,* 327 U. S. 114, did not entitle him to challenge the legality of his selective service classification in his criminal trial for refusing to report for induction (R. 84–85).

The present petition for a writ of certiorari rests principally on the contention that the decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with the decision of the Second Circuit in *United States* v. *Balogh*, 157 F. 2d 939. On January 20, 1947, after the petition was filed in the instant case, this Court, on the Government's petition (No. 800, this Term), granted certiorari in the *Balogh* case and vacated the judgment of the Circuit Court of Appeals for the Second Circuit on the authority of *Falbo* v. *United States*, 320 U. S. 549, upon which the court below in the present case rested its decision (see R. 84–85). As petitioner argues (Pet. 7–8), the present case cannot be distinguished from the *Balogh* case, for in both the registrant failed to report for induction and thereby failed to undergo the final physical examination at the induction station.

On the authority of the *Falbo* and *Balogh* decisions we respectfully submit that the decision below is correct and that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

JANUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

FILED
JAN 28 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 887

□

GERALD DAVID HUDSON, *Petitioner*

v.

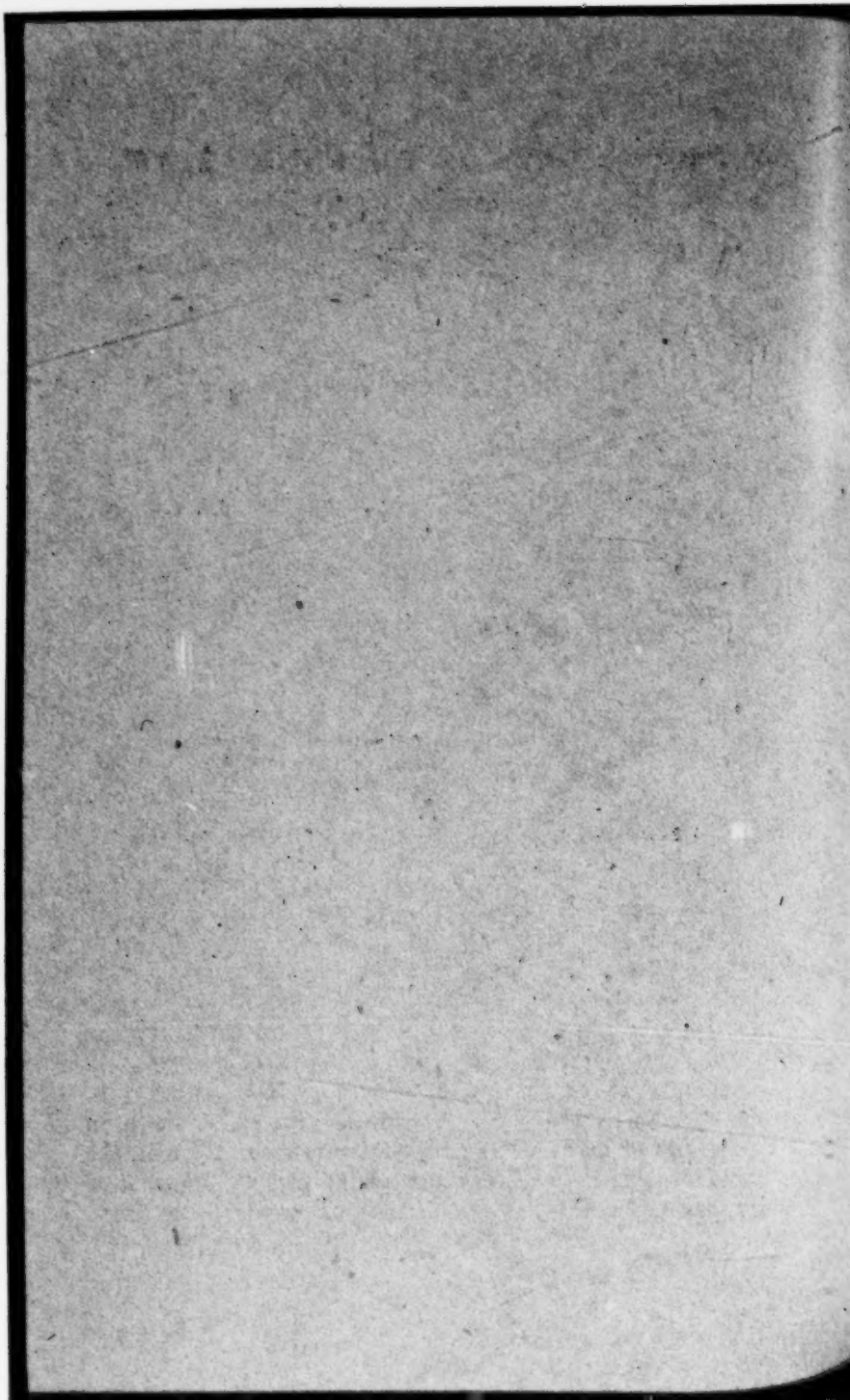
UNITED STATES OF AMERICA, *Respondent*

□

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPLICATION
for Bail Pending Disposition of Writ of Certiorari

HAYDEN C. COVINGTON
Counsel for Petitioner



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 887

□

GERALD DAVID HUDSON, *Petitioner*
v.
UNITED STATES OF AMERICA, *Respondent*

□

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPLICATION
for Bail Pending Disposition of Writ of Certiorari

TO THE SUPREME COURT OF THE UNITED STATES:

Now comes the petitioner, Gerald David Hudson, and presents for consideration his application for bail pending a disposition of his case upon a writ of certiorari. As ground therefor he states that this case "involves a substantial question which should be determined by the appellate court." Rule 48 (a) (2), Rules of Criminal Procedure.

Application for bail pending appeal was made to the district court and granted. (See record, page 14) On April 15, 1946, the court of appeals refused the petition for a stay of mandate and thereafter refused to recall the mandate pending determination of the petition for writ of certiorari. (R. 96, 98) Petitioner has now entered upon

service of the sentence imposed. He is now confined at the Medical Center for Federal Prisoners at Springfield, Missouri, where he is held in custody pending disposition of the petition for writ of certiorari.

The question presented is correlative to that involved in *United States* v. *Balogh*, No. 800 October Term 1946 pending on a petition for rehearing. That case arises under the same Act and the same Regulations as are to be considered in this case. Since bail was granted in the *Balogh* case, it should be allowed in this case. See the petition for writ of certiorari and the Respondent's Memorandum in Opposition in the *Balogh* case, for a discussion of the substantiality of the question presented.

The reason petitioner desires bail is plain. It will restore his liberty which was taken away from him by the execution of sentence. If the judgment below is reversed and the case remanded for a new trial on which new trial he is again convicted, he will be required to serve another sentence, which will be two sentences served for one offense. If upon another trial he is acquitted, then his service of this sentence or any part thereof will be unjust. It is fundamental that to avoid injustice bail should be allowed where a substantial question is involved on an appeal. There is no way of restitution of the service of an illegal sentence in a criminal action. Therefore every reason inheres to give to a defendant contesting a judgment on appeal in a criminal case the same right that a defendant contesting a money judgment in a civil case has upon appeal, which is freedom from obligation to satisfy the judgment until the appeal is determined. Consequently it is time enough for a citizen to pay a judgment rendered against him when it becomes a final judgment upon appeal, especially where his adversary may be protected against loss by bond.

The reason this application is being made to the Court, instead of to the Circuit Justice, is on account of the fact that an application was made to the Circuit Justice on January 22. The Circuit Justice declined to immediately

consider the application because of doubt as to his authority to act. Counsel for petitioner, as well as the Circuit Justice, is in doubt about whether the Court or the Circuit Justice has jurisdiction in this matter. This doubt results from a construction that has been placed on the Federal Rules of Criminal Procedure in the *Gibson* and *Dodez* cases. When application for bail was renewed after the writ of certiorari had been granted in the *Gibson* case, it was submitted to the Circuit Justice, but when bail was allowed the order granting bail was made by the Court. When application for bail was made in the *Dodez* case, simultaneously with the petition for writ of certiorari, in that case the bail was allowed by the Circuit Justice. Rule 46 (a) (2) of the Federal Rules of Criminal Procedure, providing for bail upon appeal or certiorari, is substantially a restatement of Rule 6 of Criminal Appeals Rules (See Federal Rules of Criminal Procedure, New York University School of Law, 1946, pp. 80-81, 83, 194, 216, 240.) Rule 38 (b) (c) prescribing orderly procedure in applications to a Circuit Justice for bail is a substantial re-statement of the existing law. The practice under the Statutes and the Criminal Appeals Rules would therefore seem to control the present procedure as was held in reference to the bill of discovery rules in *Hickman* v. *Taylor*, by this Court January 13, 1947, 15 LW 4139. The only decisions in reference to bail are the ones by Mr. Justice Black in *Simon* v. *United States* (unpublished opinion) and the decision of Mr. Justice Butler in *United States* v. *Motlow*, 10 F. 2d 657, to which decision reference is here made. In *Olmstead* v. *United States*, 277 U. S. 438, Mr. Justice Sutherland, acting as the Circuit Justice, admitted the petitioner to bail after the Court granted certiorari. His order is to be found in the Clerk's Files in Nos. 493, 532, and 533 October Term 1927. The importance of clarifying the procedure as to when, where, and how a petitioner may be admitted to bail by this Court and by a Circuit Court Justice warrants an explanation from this Court for the guidance of members of the Bar.

Wherefore petitioner prays that in event the writ of certiorari is granted he be admitted to bail pending the consideration of his case and the decision of this Court.

HAYDEN C. COVINGTON
Counsel for Petitioner